70-127

FILED

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IN THE

Supreme Court of the United States

October Term, 1970

No. [redacted]

CECIL HICKS, District Attorney for the County of Orange, State of California;

EDWARD J. ALLEN, Chief of Police, City of Santa Ana, State of California,

Petitioner, Defendant,

vs.

PLEASURE HOUSE, INC., a California Corporation; and NORMAN ROBERT BLAKE,

Respondent, Plaintiff.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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IN THE

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PLEASURE HOUSE, INC., A California Corporation; and NORMAN ROBERT BLAKE,

Petitioner,

vs.

CECIL HICKS, District Attorney for the County of Orange, State of California;

EDWARD J. ALLEN, Chief of Police of the Police Department of Santa Ana, State of California,

Respondents.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

Appellant's appeal from the order of the United States District Court for the Central District of California entered on February 17, 1971, filed on February 18, 1971, in Pleasure House, Inc. v. Cecil Hicks, *et al.*, Civil No. 71-228, which requires appellant Cecil Hicks, District Attorney, County of Orange, State of California and Edward J. Allen, Chief of Police, City of Santa Ana, California, to:

1. Return the films seized as evidence in a presently pending state criminal action under a validly issued state search warrant.
2. Restrain from seizing any motion picture films from Plaintiffs until such times as prior ad-

versary hearings are afforded in accordance with the mandate set forth in *Demich Inc. v. Ferdon, et al.*, 426 F. 2d 643 (9 Cir. 1970).

3. Restrain from effecting any arrests of the various Plaintiffs or their employees for violations of the obscenity laws of California.
4. Stay "those pending California State Court criminal proceedings for prosecution under the California obscenity laws specifically identified in the pleadings heretofore filed".
5. Stay all state and local proceeding to suspend or revoke theater permits or licenses of Plaintiffs for violations of California obscenity laws.
6. Wait until June 7, 1971, at 2 p.m. before presenting any motion or seek hearing on the above matters.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal.

Opinion Below.

There was no reported opinion below. Attached hereto as Appendix A is the order of the United States District Court for the Central District of California.

Jurisdiction.

Notice of appeal and designation of record on appeal were duly filed on February 22, 1971, by appellant Hicks and on March 16, 1971, by Appellant Allen.

Jurisdiction of the United States Supreme Court is invoked on the ground that the order is a final order

of injunction restraining the enforcement, operation or execution of a state statute within the meaning of 28 U.S.C. §2281 from which a direct appeal to this court is provided by 28 U.S.C. §1253. Cases which support this appeal are: *Perez v. Ledesma,* C.C.H.B. 997; *Dyson v. Stein,* C.C.H.B. 965; *Younger v. Harris,* C.C.H.B. 916; *Byrne v. Karalexis,* C.C.H.B. 1034; *Samuel v. Mackell,* C.C.H.B. 951.

Questions Presented.

1. Whether the United States District Court for the Central District of California can order the state court, the district attorney and/or the police department to return items seized as evidence in a presently pending state criminal action, pursuant to a state search warrant.

2. Whether the decisions of the United States District Court of Appeals for the 9th Circuit are collaterally binding upon all the state courts.

3. Whether the United States District Court for the Central District of California can stay the present past and future state prosecutions under a state statute against a single defendant on the ground that the state statute is unconstitutional.

4. Whether the United States District Court for the Central District of California can order all hearings and motions on the injunction be set on a fixed date four months in the future.

5. Whether the First or the Fourth Amendments of the United States Constitution require an adversary hearing on the issue of obscenity prior to a criminal arrest and seizure under a valid search warrant.

Statutes Involved.

Sections 311 and 311.2 of the California Penal Code have been set forth in the Appendix B attached hereto (Appendix pp. 3-4).

Statement of the Case.

On or about January 21, 1971, Officers F. Buckels, Gary E. Dixon, James D. Davis, David G. Salazar and Sergeant Michael Mitchell of the Santa Ana Police Department, personally appeared before the Honorable Robert Rickles, Judge of the Municipal Court of Central Orange County Judicial District and under oath testified to the facts contained in the "Affidavit in Support of Search Warrant" now on file in the above-named court, (a certified copy of this affidavit is attached to the Answer of Cecil Hicks as Exhibit A, and is filed in the Federal Court action). On that same date, Judge Robert Rickles personally viewed each movie and issued a search warrant which states "Proof by affidavit having been made this day before me and having personally gone to the Pleasure House Book Store and having there viewed the movies being displayed in the fourteen booths located in said store and having found them to be obscene, you are commanded to go and make search", (A certified copy of the Search Warrant now on file with the Clerk of the above-named court is attached to the Answer of Cecil Hicks as Exhibit B, and is filed in the federal court action). On that same date, a return to the search warrant was verified before Judge Rickles which return related the seizure of the movies described in detail in the search warrant and affidavit in support thereof. While the projectors were taken by the officers along with the movies Judge Rickles who was still

on the premises specifically told plaintiff's agents that they were being taken only because no one knew how to disengage the movies. The projectors were immediately thereafter placed at the disposal of plaintiff-respondent and his agents, and have been already recovered by plaintiff and his agents.

At the time of service of the search warrant, plaintiffs-respondents were taken into custody under duly issued arrest warrants. Said arrest warrants were based on a complaint alleging violation of Penal Code Section 311.2 in that on or about January 19, 1971, plaintiffs had distributed movies similar to the ones described in the affidavit in support of the search warrant.

The affidavit and the search warrant which describe the premises and the movies to be seized, show that the movies were being displayed upon the payment of money, in fourteen small booths located at the back of the bookstore. They further show that none of the movies have bylines, titles, credit lines, story lines or other means of identification.

The seized films are eight-millimeter stag movies depicting solely and exclusively acts of buggery, sodomy, intercourse, cunnilingus and other sexual acts and are distinguishable from each other only in the sequence in which the above acts are performed and in the composition of color and/or sex of the performing group.

The above movies contained within the fourteen booths and the booths themselves, were used as a means of semi-public sexual excitement and three different kinds of male semen were identified as recovered from said booths (see Declaration of criminalist and police officers which are attached to the Answer

to Cecil Hicks as Exhibit D and filed in the Federal Court action).

While it is true that three other cases are presently pending against plaintiffs-respondents, none of those cases involved a seizure of any materials since in each instance, the materials involved in the prosecution were obtained through a purchase for which plaintiff duly accepted payment in legal tender.

On or about February 16, Appellants Cecil Hicks and Edward J. Allen were informed by Plaintiff-respondents that a complaint for declaratory judgment, damages and injunction had been filed or was being filed by them against Cecil Hicks, District Attorney of Orange County, California, and against Edward J. Allen, Chief of Police, City of Santa Ana, California. At that time, appellants were telephonically informed that a hearing for an order of injunction would be had the following day in the United States District Court. Appellants were unable to attend. On February 19, appellants were served with the order of the court. Appellants filed an answer and this appeal followed. A motion for stay pending appeal was also filed by Appellants on March 3, 1971, and is presently pending before the Federal District Court, that Court having taken no action on the motion for stay.

The Questions Presented Are Substantial.

The very fabric of state-federal relationships is at issue in this case since the broadness of the order makes it impossible for the state to prosecute three wholly unrelated cases presently pending against plaintiff-respondent without risk of Federal contempt and the automatic setting of all relevant motions for June 7, makes

it impossible to obtain relief. The following federal questions are presented:

1. Identical issues have been presented to the United States Supreme Court in *Perez v. Ledesman*, C.C.H.B. 997; *Dyson v. Stein*, C.C.H.B. 965; *Younger v. Harris*, C.C.H.B. 916; *Byrne v. Karalexis*, C.C.H.B. 1034 and *Samuels v. Mackell*, C.C.H.B. 951 (February 23, 1971); and in those opinions, the Supreme Court has held that the Federal Court has no jurisdiction over causes of action such as the one before this United States District Court.

2. The United States District Court has no jurisdiction to order the return of property seized pursuant to a search warrant where the state criminal prosecution has begun prior to the filing of the federal suit.

3. The United States District Court has no jurisdiction to enjoin the operation of a state criminal action or to prohibit future arrests under a state statute.

4. Neither the First nor the Fourth Amendments of the United States Constitution require an "adversary hearing" on the issue of obscenity prior to an arrest or a search held pursuant to a search Warrant (*Cf. Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, affd. *sub. nom.*; *New York Feed Co. v. Leary*, 397 U.S. 98.

5. An opinion of the United States Court of Appeals for the Ninth Circuit does not collaterally bind the state courts.

ARGUMENT.

I.

The Supreme Court Has Specifically Held That Where the Federal Court Would Have No Jurisdiction to Issue an Injunction It Has No Jurisdiction to Issue a Declaratory Judgment.

In *Younger v. Harris,* C.C.H.B. 916, defendant filed a complaint in Federal Court seeking an injunction against the enforcement of a criminal statute. A three-judge Federal Court, convened pursuant to 28 U.S.C. §2284, held it had jurisdiction to do so and restrained the District Attorney from further prosecution of the currently pending action against Harris. The Supreme Court in dissolving the injunction and in reversing the judgment stated:

> . . . we have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.

In holding that the very taking of jurisdiction for the purpose of issuing a declaratory judgment, is improper in cases similar to *Younger v. Harris,* the Court at Note 2 went on to say:

> Appellees did not explicitly ask for a declaratory judgment in their complaint. They did, however, ask the District Court to grant "such other and further relief as to the Court may deem just and proper." and the District Court in fact granted a declaratory judgment. For the reasons stated in our opinion today in *Samuels v. Mackell, post,* we

> hold that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.
>
> In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." *Fenner, supra.* Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

The United States Supreme Court in that same opinion has clearly held that prohibition against interference with state rights applied to the issuance of declaratory judgments as well as to injunctions. Neither, says the Supreme Court, should issue where state criminal proceedings are pending.

In *Samuels v. Mackell,* C.C.H.B. p. B951, 955, the court states:

> In cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles

of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "further necessary or proper relief," and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, 28 U.S.C. §2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would.

II.

The Order Requiring Defendant to Return the Property Seized by State Authorities Should Be Vacated Because It Was Beyond the Jurisdiction of the Court.

In addition to the above, three decisions of the Supreme Court specifically focused on obscenity. In *Dyson v. Stein*, C.C.H.B. p. B961, the facts showed that Stein had been charged with two violations of the Texas Penal Code which prohibited, among other things, possession of obscene matter. Stein brought action in Federal Court naming the District Attorney

and the Chief of Police as defendants and asked the Federal Court for:

> [P]ermanent injunctive relief against the Dallas Police Department, requiring that . . . there be no arrest on plaintiff, nor seizure of his property on grounds of obscenity without a prior judicial determination of the obscene character of the material in question; . . .
>
> . . . That the Court adjudge, decree and declare the rights of the parties with respect to the application of Article 527 of the Texas Penal Code: . . . That the Court grant such other and further relief as is just and equitable.

A three-judge Federal Court, duly convened, declared the statute to be unconstitutional and issued "appropriate" declaratory and injunctive relief effectuating its conclusions. In reversing and remanding, the Supreme Court stated:

> In this case the District Court made no findings of any irreparable injury as defined by our decisions today; therefore, the judgment of the District Court is vacated and the case is remanded for reconsideration in light of *Younger v. Harris, ante,* and *Samuels v. Mackell, ante.* See also *Boyle v. Landry, ante.*

In so far as it relates specifically to the validity of an order of the Federal Court ordering the return of materials seized pursuant to a valid state statute on obscenity, the Supreme Court has found such an order to be properly before the Supreme Court on direct appeal because properly (that is jurisdictionally) made by

a three-judge court. It further found such an order to be improper infringement upon state rights. In *Perez v. Ledesma*, C.C.H.B. p. B977:

> Ledesma and the other appellees operated a newsstand where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, LSA-RS 14-106, . . . After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That Court held the Louisiana statute constitutional on its face, but ruled that the arrests of appellees and the seizure of the allegedly obscene materials were invalid for lack of a prior adversary hearing on the character of the seized materials.

The District Court declined to enjoin prosecution but "did enter an order suppressing the seized items as evidence and requiring the return of the items to the appellees. The Supreme Court took jurisdiction over the order by stating:

> Under 28 U.S.C. §1253, an aggrieved party in any civil action required to be heard and determined by a district court of three-judges "may appeal to the Supreme Court from an order grant-

> ing or denying . . . an interlocutory or permanent injunction." The orders directing the suppression of evidence and the return of the seized material were injunctive orders against the appellants. Thus, we have jurisdiction to review those orders.

In *reversing* the order the Supreme Court went on to say:

> According to our holding in *Younger v. Harris, ante,* such federal interference with a state prosecution is improper. The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals. Only in cases of *proven* harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate. See *Younger v. Harris, ante; Ex parte Young,* 209 U.S. 123 (1908). There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws. We therefore hold that the three-judge court improperly intruded into the State's own criminal process and reverse its orders suppressing evidence in the pending state prosecution and directing the return of all seized materials.

The Supreme Court concluded:

> "The judgment of the Court below is reversed insofar as it grants injunctive relief."

Interestingly, Mr. Justice Marshall in his concurring opinion places particular stress on the fact that in at least one case, *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288, 295-297 (SDNY 1969), a three-judge court found *against* the necessity of a hearing prior to an arrest for obscenity. The opinion further points out that the United States Supreme Court *had affirmed* that decision *sub. nom., New York Feed Co. v. Leary*, 397 U.S. 98 (1970).

Finally in *Byrne v. Karalexis*, C.C.H.B. p. B1034, the Supreme Court reversed the order of the District Court and remanded. In that case:

> As a result of exhibiting the film entitled "I am Curious (Yellow)" at their theatre, appellees were charged by District Attorney Byrne with violating Massachusetts General Laws Chapter 272 § 28A, which prohibits the possession of obscene films for the purpose of exhibition.
>
> After the filing of the original state indictments against them appellees brought the present action in federal court. They sought an injunction against both pending and future prosecutions under the Massachusetts obscenity law, and a declaration that the state obscenity law was unconstitutional on its face and as applied.

The Supreme Court points out that even though the Federal Court in that case had made a finding of possible irreparable injury, the order had to be reversed and remanded because:

> There was, however, no finding by the District Court that the threat to appellee's federally protected rights is "one that cannot be eliminated by his defense against a single criminal prosecution."

> *Younger v. Harris, ante.* Because the District Court, in considering the propriety of injunctive and declaratory relief in this case, was without the guidance provided today by our decisions in *Younger v. Harris, supra,* and *Samuels v. Mackell, ante,* we vacate the judgment below and remand for reconsideration in light of those decisions.

In light of the above opinions of the Supreme Court of the United States it is respectfully submitted that where as here the order of the Court below directs the *return* of property seized pursuant to a valid state search warrant solely because of the lack of prior adversary hearing; where as here the seized property is evidence in a presently pending state criminal action; where as here no showing of immediate injury has been made, the order is void because beyond the jurisdiction of the court—doubly so when issued by a *single* judge.

III.

A Decision of the United States Court of Appeals for the Ninth Circuit Does Not Collaterally Bind a State Court.

The Federal District Court order is an attempt to collaterally enforce *Demich Inc. v. Ferdon, et al.,* 426 F. 2d 643 (9 Cir. 1970) by enjoining seizures without a prior adversary hearing. The state courts, however, cannot be bound by the constitutional interpretation placed on state statutes by the lower federal courts. The very fact that 28 U.S.C. provides for a three-judge Federal District Court in matters of constitutionality of state statutes and further provides for direct appeal to this Court, thus totally bypassing the Circuit Courts gives weight to appellant's position.

Demich, supra, has been remanded by this Honorable Court for reconsideration in light of *Harris, supra,* since the opinion indirectly declared a statute constitutionally inadequate. The opinion thus presents no valid authority for the action of the court in this case.

Moreover, such collateral application if allowed, would bring about the very same result condemned in *Dyson v. Stein, supra.*

For the above reasons, Appellants contend that the questions presented by this Appeal are substantial and the order of the District Court in direct conflict with and in contravention of the opinions of this Honorable Court.

Respectfully submitted,

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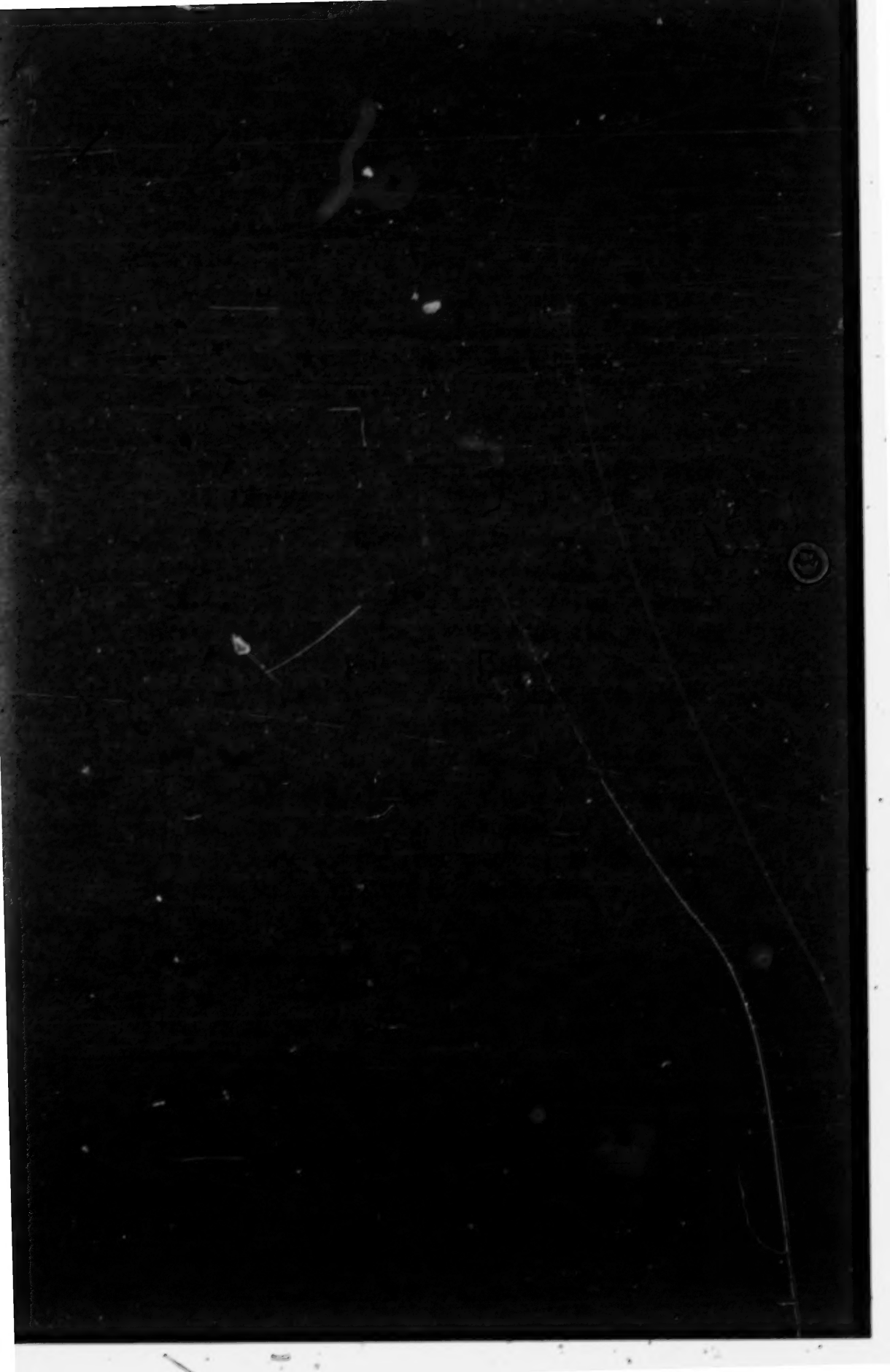

APPENDIX A.

Temporary Restraining Order.

United States District Court, Central District of California.

Pleasure House, Inc., a California corporation; and Norman Robert Blake, Plaintiffs, vs. Cecil Hicks, District Attorney for the County of Orange, State of California, et al., Defendants. Civil No. 71-228-ALS.

Filed: Feb. 18, 1971.

Having read the verified Complaint on file herein, IT IS ORDERED that:

1. The motion picture films and equipment which have been seized by the Defendants and which are in the custody or under the control of Defendants at this time will be returned to the respective Plaintiffs forthwith; provided that as a condition to granting or continuing this relief, Plaintiffs are ordered to keep in their possession, unaltered, the films seized and returned, pending further order of this Court.

2. Defendants shall not seize any motion picture film from the various Plaintiffs until such times as prior adversary hearings are afforded in accordance with the mandate set forth in *Demich, Inc. v. Ferdon, et al.*, 426 F.2d 643 (9 Cir. 1970).

3. The Defendants shall not effect any arrests of the various Plaintiffs or their employees for alleged violations of the obscenity laws of the State of California, but may issue citations in accordance with the citation procedure set forth in California Penal Code Section 853.6.

4. Those pending California state court criminal proceedings for prosecution under the California ob-

scenity laws, specifically identified in the pleadings heretofore filed, are stayed pending the further order of this Court.

5. All state and local proceedings to suspend or revoke theater permits or licenses of Plaintiffs for violations of California obscenity laws are stayed pending further order of this Court.

6. Plaintiffs shall deposit with the Clerk of this Court Five Hundred Dollars ($500.00) per case as security for costs and damages to any party who is found to have been wrongfully enjoined or restrained. Fed. R. Civ. P., Rule 65(c).

7. The hearings as to all motions are continued to June 7, 1971, at 2:00 o'clock P.M., the cases to continue upon the calendar of this Court. The Court retains full jurisdiction of all matters which are presented to it or may hereafter be presented to it in connection with the proceedings.

The Clerk is ordered to serve copies of this order on all parties to this action, and on the Attorney General and Governor of the State of California.

DATED: February 17, 1971.

ALBERT LEE STEPHENS, JR.
/s/ Albert Lee Stephens, Jr.
United States District Judge

APPENDIX B.

PENAL CODE SECTION 311

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in Nudity, sex, or excretion; and is a matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity, indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical

or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(Added by Stats. 1961, c. 2147, p. 4427, § 5, Amended by Stats. 1969, c. 249, p. 598, §1.)

PENAL CODE SECTION 311.2—Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state.

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to another, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(Added by Stats. 1961, c. 2147, p. 4475, §5. Amended by Stats. 1968, c. 399, p. 834, §1; Stats. 1969, c. 249, p. 598, §2.)

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Appellants,

vs.

PLEASURE HOUSE, INC., a California corporation; and NORMAN ROBERT BLAKE,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

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United States Code, Title 28, Sec. 2281 .....3, 4

United States Code, Title 28, Sec. 2284 4

United States Code, Title 28, Sec. 2284(3) 2, 4, 6, 7

United States Code, Title 42, Sec. 1983 4

United States Constitution, First Amendment 2, 5

United States Constitution, Fourth Amendment 2, 5

United States Constitution, Fourteenth Amendment 2, 5

Textbooks

9 Moore on Federal Practice (2d Ed. 1970), para. 110.03, pp. 68-85 6

37 University of Chicago Law Review (1967), pp. 159-165 6

IN THE

Supreme Court of the United States

October Term 1971
No. 70-127

CECIL HICKS, District Attorney for the County of Orange, State of California; EDWARD J. ALLEN, Chief of Police, City of Santa Ana, State of California,

Appellants,

vs.

PLEASURE HOUSE, INC., a California corporation; and NORMAN ROBERT BLAKE,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM.

The appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the order of the district judge on the ground that the order of the said judge was clearly correct and that it is manifest under the particular record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinions Below.

There was no opinion rendered by the District Court. As appears from Appendix A attached to appellants' Jurisdictional Statement, the appeal herein is solely from a temporary restraining order issued by a single district court judge.

Jurisdiction.

It is respectfully submitted that the appeal herein is not within the jurisdiction of this Court and is not taken in conformity to statute or to the rules of this Court. As discussed hereafter, reliance upon 28 U.S.C. §1253 as purportedly conferring jurisdiction on this Court of the appeal herein is unwarranted.

Questions Presented.

1. Whether an appeal from a temporary restraining order issued by a single district judge pursuant to 28 U.S.C. 2284(3) is within the jurisdiction of this Court, or whether such appeal, if reviewable at all, lies only with the court of appeals.

2. Whether the issuance of the temporary restraining order by the district judge pursuant to 28 U.S.C. 2284(3) pending the convening of a three-judge district court was correct, when the verified complaint and papers in support thereof requested injunctive relief against enforcement of state statutes upon substantial and non-frivolous grounds that the statutes were unconstitutional under the First, Fourth and Fourteenth Amendments; demonstrated direct, immediate, and irreparable injuries with threats to continue the same lawless conduct in the future; showed the massive and

repeated seizure of motion picture films, as well as the seizure of projectors not even mentioned in a search warrant; detailed repeated seizures without any prior adversary proceedings; showed that appellants had violated prior orders of the federal court holding seizures without adversary proceedings to be unconstitutional; and where all opportunity to vindicate appellees' constitutional claims were and are foreclosed by rulings of the highest courts of the State.

Statutes Involved.

The provisions of 28 U.S.C. §§2281 and 1253, the sections upon which appellants rely to support their jurisdictional claim are as follows:

> §2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.
>
> §1253. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Statement of the Case.

The action herein was commenced by the filing of a verified complaint in the United States District Court for the Central District of California, invoking the jurisdiction of the said court under 28 U.S.C. §§1331 and 1343. The action sought injunctive relief against deprivation of constitutional rights (42 U.S.C. §1983) and declaratory and injunctive relief upon the grounds that certain state statutes were unconstitutional on their face and as construed and applied. The complaint therefore invoked the three-judge court jurisdiction of the district court pursuant to 28 U.S.C. §§2281 and 2284.

Shortly after the case was filed, the Honorable Albert Lee Stephens, Jr., a Judge of the United States District Court for the Central District of California, certified a request to the Chief Judge of the Court of Appeals for the Ninth Circuit, requesting the designation of a statutory three-judge court. This certified request was made on February 9, 1971. On February 17, 1971, the said district judge entered a temporary restraining order pursuant to 28 U.S.C. §2284(3). It is this temporary restraining order from which the appellants appeal.

On or about April 12, 1971, appellants applied for a stay of the aforesaid temporary restraining order to a Justice of this Court. On April 26, 1971, Mr. Justice Brennan denied the application for a stay with the following endorsement thereon: "Application denied without prejudice to an application to the Court of Appeals."

The verified complaint alleged, among other things, that Pleasure House, Inc., exhibited motion picture films at its place of business to adults only, without intruding upon the privacy or sensibilities of the general

public; that pursuant to a search warrant, issued on or about January 21, 1971, without a prior adversary hearing, appellant Hicks and his agents seized 8 different motion picture films and, at the same time, seized 13 projectors used for viewing of motion picture films, although the said projectors were not mentioned in the search warrant; that the conduct of appellants had caused and threatened to cause substantial and irreparable injury to appellees; and that the true intent and purpose of appellants was to establish a censorship of the films, to impose prior restraints upon the exercise of freedom of expression, to harass appellees and exhaust their financial resources, to deny the public access to nonobscene films, and to subject appellees to arbitrary, capricious and irrational deprivation of liberty and property without due process of law, in violation of the free speech, due process and equal protection guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

The complaint also alleged that prior to the seizure of the 13 motion picture projectors and the films involved herein, appellant Hicks had been ordered by a different United States Judge for the Central District of California to return a different motion picture film seized without a prior adversary hearing; that the order of the said district judge was affirmed by the United States Court of Appeals for the Ninth Circuit on January 8, 1971. Thus, approximately two weeks after the Court of Appeals for the Ninth Circuit had explicitly ruled that appellants could not seize a motion picture film without a prior adversary hearing, appellant Hicks engaged in such lawless seizures, seizing not only 8 films, but also 13 projectors, the latter material not having even been mentioned in the search warrant ob-

tained by appellant. The purpose and intent to put appellees out of business by the lawless enforcement of the law, continual harassment and bad faith enforcement, even to the extent of violating final orders made by courts of law, were plainly manifested by the allegations contained in the verified complaint.

ARGUMENT.

1. The appeal herein is concededly an appeal from a temporary restraining order entered by a district judge pursuant to 28 U.S.C. §2284(3). A request to the Chief Judge of the Court of Appeals for the Ninth Circuit for the designation of a statutory three-judge court had been made shortly prior to the rendition of the said temporary restraining order. The appellants have merely appealed from the temporary restraining order and invoked jurisdiction under 28 U.S.C. §1253.

It is submitted that a direct appeal to this Court will lie only when a three judge court entertains a claim of invalidity by reason of unconstitutionality, determines the action on that ground alone, and grants or denies an injunction. It is submitted that where a single judge, as in the case herein, grants a temporary restraining order pending the convening of a three-judge court, review, if it exists at all, lies solely with the court of appeals. See, *Stratton v. St. Louis Southwestern Ry.*, 282 U.S. 10; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713; *Schackman v. Arnebergh*, 387 U.S. 427; *Wilson v. City of Port Lavaca*, 391 U.S. 353; *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83; 9 Moore's Federal Practice (2d Ed. 1970) ¶ 110.03, 68-85; Currie, Appellate Review of the Decision Whether or not to Empanel a Three-Judge Federal Court, in 37 U. of Chi. L. Rev. 159-165 (1967).

In the light of the aforesaid, the appellees submit that the motion to dismiss the appeal upon the ground that the appeal is not within the jurisdiction of the Court should be granted.

2. In the alternative, the temporary restraining order entered by the court was clearly correct. The allegations of the verified complaint set forth substantial questions with respect to the constitutional validity of the state statutory search and seizure procedures and the state obscenity law. The complaint also alleged facts which establish that the appellees had been subjected to direct, immediate, and irreparable injuries, and that such great and irreparable harm was caused by appellants who threatened to continue their lawless conduct in the future. On this state of the record, substantial non-frivolous constitutional questions having been presented, the district judge appropriately notified the Chief Judge of the Court of Appeals for the Ninth Circuit that an application for injunctive relief against the enforcement of the state statutes had been presented and required the convening of a three-judge court. The district judge then granted a temporary restraining order to prevent irreparable damage, as provided under 28 U.S.C. §2284(3). At this point, appellants filed their appeal from the said temporary restraining order.

This is a case which requires full hearing and determination by a three-judge court. The bad faith harassment and discriminatory enforcement has been manifested by the repeated seizure and suppression of motion picture films by appellants, even to the extent of seizing the instrumentalities used for the viewing of motion picture films. The massive seizure of the projectors, which were not even mentioned in a search war-

rant, indicates a lawless disregard for the Constitution and a deliberate attempt to put appellees out of business under the guise of enforcing the state obscenity law. No adversary proceeding before the judicial officer was ever held prior to the seizure of these projectors. See, *United States v. Polak*, 312 F. Supp. 112, 116-118 (D.C. Pa. 1970).

The repeated seizures of the motion picture films were all made without any prior adversary hearing, contrary to the Constitution and the applicable decisions of this Court. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrants of Property*, 367 U.S. 717. At least six courts of appeals and an overwhelming number of district courts have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed dissemination of nonobscene expression. *Berkview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d ... (2 Cir.) Docket No. 33997, cert. denied 90 S. Ct. 941; *United States v. Alexander*, 428 F. 2d 1169 (8 Cir. 1970); *Cambist Films, Inc. v Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7 Cir. 1968); *Dominick, Inc. v. Ferdon*, 426 F. 2d 643 (9 Cir. 1970), vacated and remanded

91 S. Ct. 1223. See also, *Turner v. Wilhelm*, 91 S. Ct. 919, denying certiorari after the decisions by the Court in *Perez, Younger*, etc., where a warrantless seizure of material without a prior adversary hearing was held violative of the rule in *Kansas*, 431 F. 2d 177 (8 Cir. 1970).

This is a situation where the State has been afforded every opportunity to correct constitutional defects but has specifically declined to do so. State procedures offer no hope of vindication of appellees' federal claims. Under rulings by the highest courts of the State, the state statutory search and seizure procedures are not violated by permitting the seizure and suppression of motion picture films without a prior adversary hearing in a judicial proceeding; motion picture films may be seized and suppressed solely on the basis of an *ex parte* determination of alleged "probable cause" by a police officer, and "probable cause" is the only issue in any subsequent restoration proceeding; there is no burden upon the State to initiate judicial review, and there is no time limitation on the suppression in advance of a final judicial determination and no assurance of a prompt, final judicial decision; and all speedy and expeditious review is denied. See, *Monica Theatre, Inc. v. Municipal Court*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970), hearing denied Calif. Sup. Ct., Sept. 11, 1970; *People v. Luros*, 4 Cal. 3d 84, 92 Cal. Rptr. 833 (1971).

In the light of the governing state law, the right to seek federal relief is plainly justified and relief un-

doubtedly should be granted since direct, immediate, and great irreparable harm can be established and the decisions of the state courts are plainly contrary to the Constitution and the interpretative decisions of this Court. See, in addition to cases previously cited, *Blount v. Rizzi*, 400 U.S. 410; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

The appellants make no adequate denial of the bad faith harassment and discriminatory enforcement alleged in appellees' complaint. The appellants concede that no prior adversary hearing was ever afforded appellees, and insist that no prior adversary proceedings will be afforded in the future. It is also legally significant that appellants, prior to the time of these repeated seizures, had been ordered to return a different motion picture film seized without a prior adversary hearing. This prior order had been entered by a different district judge for the same district court (*Grove Press, Inc. v. Younger, et al.*, No. 69-2554-FW, Complaint, Par. XXIII) and this order of the district court was affirmed by the United States Court of Appeals for the Ninth Circuit (*Grove Press, Inc. v. Younger, et al.*, No. 26454). The order of the court of appeals was rendered on January 8, 1971, and, despite the fact that the court of appeals ruled that appellants could not seize a motion picture film without a prior adversary hearing, appellants, some two weeks later, proceeded to seize the 8 motion picture films and the 13 projectors involved in the proceeding herein. *Cf., Walker v. City of Birmingham*, 388 U.S. 307.

Conclusion.

WHEREFORE, appellees respectfully move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rules of the Court, or, in the alternative, to affirm the order of the district judge on the ground that the order of the said judge was clearly correct and that it is manifest under the particular record here presented that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Appellees.

SAM ROSENWEIN,
Of Counsel.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, ET AL. *v.* PLEASURE HOUSE, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70-127. Decided October 12, 1971

This Court has no jurisdiction under 28 U. S. C. § 1253 to entertain a direct appeal from a temporary restraining order issued under 28 U. S. C. § 2284 (3) by single district judge after he had certified a request for designation of three-judge court to hear suit for permanent relief.

Appeal dismissed.

PER CURIAM.

The appellants seek review of a temporary restraining order entered by a single district judge in a case certified for presentation to a statutory three-judge court. The order, *inter alia*, stayed a pending prosecution of the appellees under certain state obscenity laws and temporarily restrained further enforcement of the laws against the appellees. It was entered by the District Judge shortly after he had certified a request for designation of a three-judge court to hear the appellees' suit for permanent declaratory and injunctive relief. Under

28 U. S. C. § 2284 (3), a single district judge has power to enter such an order in a case to be heard by a three-judge court, but the order can be entered only "to prevent irreparable damage" and can "remain in force only until the hearing and determination by the full court."

The appellants argue that the order in this case contravenes principles set forth last Term in *Younger* v. *Harris*, 401 U. S. 37 (1971). They invoke this Court's jurisdiction on direct appeal from "an interlocutory or permanent injunction" in any action "required . . . to be heard and determined by a district court of three judges," under 28 U. S. C. § 1253. Since, however, § 1253 does not authorize a direct appeal to this Court from a § 2284 (3) order by a single district judge, we dismiss this appeal for want of jurisdiction.

Long ago, this Court made clear that no direct appeal lies under § 1253 to the Supreme Court from a temporary restraining order issued by a single judge, even though the order may amount to an "interlocutory injunction" and may have been issued in an action required to be heard by a three-judge court. *Stratton* v. *St. Louis S. R. Co.*, 282 U. S. 10.[1] See *Ex parte Metropolitan Water Co.*, 220 U. S. 539. This is so because § 1253 "plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement." *Stratton* v. *St. Louis S. R. Co.*, *supra*, at 16. See *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U. S. 83; *Wilson* v. *City of Port*

[1] In the instant case, the single judge himself determined that the action was one required to be heard by a three-judge court and then entered his temporary restraining order; in *Stratton*, *supra*, on the other hand, the single judge erroneously determined that a three-judge court was not required and then entered a similar order. This distinction between the cases, however, makes no difference in principle.

Lavaca, 391 U. S. 352; *Schackman* v. *Arnebergh*, 387 U. S. 427; *Buchanan* v. *Rhodes*, 385 U. S. 3.

More recently, this Court has held that an appeal may lie to a court of appeals from certain action of a single district judge in a case required to be heard by three judges. *Mengelkoch* v. *Industrial Welfare Comm'n, supra; Wilson* v. *City of Port Lavaca, supra; Schackman* v. *Arnebergh, supra; Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713. A court of appeals is not "powerless . . . to give any guidance when a single judge has erroneously invaded the province of a three-judge court." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra*, at 716. Thus, if a single judge oversteps his limited authority under § 2284 (3), a court of appeals may correct his error. In addition, a temporary restraining order issued pursuant to § 2284 (3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U. S. C. §§ 1291 and 1292 (a). However, if no such appeal is taken before the three-judge court is convened,[2] application must be made to that court for vacation or modification of the temporary restraining order pending a final determination on the merits.

The appeal is dismissed for want of jurisdiction.

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[2] The papers before the Court in this case do not make clear whether or not the three-judge court has now been convened.